

ELLIS:LAWHORNE

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June 24, 2005

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE

The Honorable Charles L.A. Terreni
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Joint Petition for Arbitration of NewSouth Communications, Corp.,
NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III
LLC, and Xspedius [Affiliates] of an Interconnection Agreement with
BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the
Communications Act of 1934, as Amended
Docket No. 2005-57-C, Our File No. 803-10208

Dear Mr. Terreni:

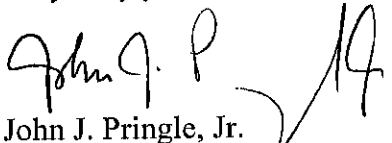
Enclosed is the original and ten (10) copies of the **Response to Motion to Strike** for filing on behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] in the above-referenced matter. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


John J. Pringle, Jr.

JJP/cr

cc: Office of Regulatory Staff
all parties of record

Enclosures

**BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
DOCKET NO. 2005-57-C**

In the Matter of)

)
Joint Petition for Arbitration of)
NewSouth Communications, Corp.,)
NuVox Communications, Inc.,)
KMC Telecom V, Inc.,)
KMC Telecom III LLC, and)
Xspedius [Affiliates] of an)
Interconnection Agreement with)
BellSouth Telecommunications, Inc.)
Pursuant to Section 252(b) of the)
Communications Act of 1934,)
as Amended)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day, one (1) copy of the **Response to Motion to Strike** by placing a copy of same in the care and custody of the United States Postal Service with proper first-class postage affixed hereto (and by electronic mail service), and addressed as follows:

Patrick Turner, Esquire
BellSouth Telecommunications, Inc.
P.O. Box 752
Columbia SC 29202

Office of Regulatory Staff
Legal Department
PO Box 11263
Columbia SC 29211



Carol Roof

June 24, 2005

Columbia, South Carolina

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-57-C

IN RE:

Joint Petition for Arbitration on behalf
of NewSouth Communications Corp.,
NuVox Communications, Inc., and
Xspedius [Affiliates] for an
Interconnection Agreement with
BellSouth Telecommunications, Inc.
Pursuant to Section 252(b) of the
Communications Act of 1934, as
Amended.

)
)
) **RESPONSE TO BELLSOUTH’S**
) **MOTION TO STRIKE**
)
)
)
)

NewSouth Communications Corp. (“NewSouth”); NuVox Communications, Inc.
 (“NuVox”); and the Xspedius Affiliates (collectively “Xspedius”) (together, the “Joint
Petitioners”), by their attorneys, provide the following Response to BellSouth’s Motion to Strike.

INTRODUCTION

BellSouth has paid Hamilton E. “Bo” Russell, III the highest compliment a witness can
receive: a desperate attack on his professional ethics in an attempt to keep the Commission from
considering his testimony. When proper methods of responding to Mr. Russell’s testimony
(objections, BellSouth witness rebuttal testimony and cross-examination) failed, BellSouth has
now resorted to allegations wholly unrelated to Mr. Russell’s testimony that call into question
Mr. Russell’s fitness as an attorney as a means to gain an advantage in this proceeding.

BellSouth’s attack is baseless: without foundation in law, fact, advisory text, or common
practice. Joint Petitioners do not use the term “baseless” rhetorically. BellSouth failed to cite to

a single case, advisory opinion, treatise or other authority to support its Motion. BellSouth's Motion alleges violations of the Rules of Professional Responsibility (applicable to the obligations of attorneys acting in a representative capacity), but seeks (without foundation) an extraordinary remedy requiring application of the South Carolina Rules of Evidence (applicable to the testimony of witnesses).

BellSouth claims that by virtue of Mr. Russell going to work for Nelson Mullins, BellSouth owns his South Carolina testimony now. Such a claim is presumptuous, even by BellSouth's standards. If indeed Mr. Russell were "representing" NuVox in this proceeding or "advocating" on NuVox's behalf (and he was not), and the issue were raised, the proper remedy in the event that a conflict did exist would have been for Mr. Russell to withdraw as counsel. As discussed herein, Mr. Russell did not appear in this case as representative, counsel, or advocate for NuVox. As a result, no rule, law or custom prevented Mr. Russell from presenting testimony as a witness.

ARGUMENTS

MR. RUSSELL HAS NOT "REPRESENTED" OR "ADVOCATED FOR" NUVOX

Mr. Russell appeared as a *witness* in the arbitration proceeding, as he has done without objection in *seven* other BellSouth states. Commission Rule 104-804(R) defines "appearance" as "the act of offering sworn testimony in a formal proceeding before the Commission." Offering sworn testimony has been Mr. Russell's only role in this case. Accordingly, Mr. Russell is not "representing" NuVox in this case. Commission Rule 103-804(S)(1) defines "representation" as

the act of serving as counsel for a party, or of serving as the authorized representative of a party before the Commission. Representation of a party of record in a formal proceeding shall include the right to offer evidence on behalf of the party represented and to cross-examine witnesses offered by other parties.

Further, Rule 1.7 of the South Carolina Rules of Professional Conduct (the “Rules”) by its explicit language only applies to attorneys who “represent a client,” not to those attorneys who serve as witnesses. In order to establish a conflict under Rule 1.7 (and imputed disqualification under Rule 1.10) BellSouth would have to demonstrate that that Mr. Russell “represents” NuVox in this case. BellSouth has not done so. Mr. Russell did not enter an appearance as an attorney in this case. (Nor did Mr. Russell enter an appearance as an attorney representing NuVox in any other BellSouth state.) He signed no pleadings, participated in no pre-hearing discussions involving counsel for the parties and the Hearing Officer, sponsored no witnesses, and cross-examined no witnesses. He was not introduced to the Commission as counsel of record for the Joint Petitioners.

Nor did Mr. Russell act as an “advocate” on behalf of NuVox, as that term is used in the Rules of Professional Conduct. (An “advocate” makes argument in front of the fact-finder at a trial or hearing, and is undertaking more than merely “representing” a client. All “advocates” are “representing” their clients, but not all representatives are necessarily “advocates.” Mr. Russell is neither in this case). Mr. Russell conducted no cross-examination, neither made nor responded to any objections, and argued no motion or other point of law raised by the parties before the Commission. It is not sufficient to allege, as BellSouth has, that Mr. Russell’s testimony “advocates NuVox’s legal and policy position on various issues.” BellSouth Motion at Page 5, and point out that position was “directly adverse” to BellSouth’s position. (The statement that NuVox’s position is “directly adverse” to that of BellSouth is a blinding glimpse of the obvious).

Rule 3.7 of the Rules of Professional Responsibility demonstrates that an attorney appearing as a witness in a case – what took place in this case -- is not acting as an “advocate.”

Rule 3.7(a) provides that “a lawyer shall not *act as advocate* at a trial in which the lawyer is likely to be a necessary witness” (Emphasis added). Rule 3.7 clearly distinguishes between an “advocate” and a “witness,” just as the Commission’s Rules distinguish “representation” from witness “appearance.” The South Carolina Bar Ethics Advisory Committee has confirmed that BellSouth’s view of the Rules is flat wrong: “The Rules of Professional Conduct do not prohibit an attorney from being a witness, provided that the attorney does not blend his role as attorney and witness.” South Carolina Bar Ethics Advisory Opinion 99-03 (Construing Rule 3.7) (attached hereto as **Exhibit A**). Thus, BellSouth’s notion that a witness who happens to be an attorney “advocates” for the person on whose behalf he testifies is false.

The Rule is designed to avoid the conflicts that may arise when an attorney is arguing before the tribunal and appearing on the witness stand. As one Advisory Opinion put it: “An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility.” South Carolina Bar Ethics Advisory Opinion 90-05 (construing previous rules DR 5-101 and 5-102) (attached hereto as **Exhibit B**). To avoid this scenario, except in certain limited circumstances, a lawyer acting as an “advocate” shouldn’t serve as a witness; a lawyer serving as a witness shouldn’t act as an advocate.

Rule 3.7 is triggered when an attorney is called upon to serve both as an “advocate” on behalf of a client, *and* a witness. As is described more fully below, when an attorney is faced with this dilemma, the Rule and the Bar Advisory Opinions require that the lawyer be disqualified *as an advocate*. See, e.g. South Carolina Bar Ethics Advisory Opinion 05-06 (attached hereto as **Exhibit C**). Because Mr. Russell was nothing more than a witness in this case, he cannot be considered an “advocate” as the term is employed in the Rules of Professional Conduct.

“Represent” and “advocate” – terms of art with specific application under the Rules of Professional Conduct -- apply only when attorneys either enter an appearance as an attorney in a case, and/or advocate in that representative capacity. Advocating a position (as every single witness testifying before the Commission does) does not make Mr. Russell an “advocate” or constitute the “representation” of a client pursuant to the Rules. Where Mr. Russell sat (with the other Joint Petitioners on the witness panel, rather than at the counsel table), and his actions during the course of this Docket – providing testimony rather than arguing objections and examining witnesses -- determined his status – not the fact that he took a position on behalf of his employer. Mr. Russell never served as an attorney representative of NuVox or an “advocate” on behalf of NuVox during this case.

**THE COMMISSION’S RULES FURTHER DEMONSTRATE
THAT A “WITNESS” IS NOT A “REPRESENTATIVE”**

BellSouth has tried to blur the very clear line that exists between witnesses and those attorneys who represent and advocate on behalf of clients. However, the Commission’s Rules of Practice and Procedure plainly maintain the distinction. Rule 103-867, “Standard of Conduct,” requires that:

All individuals *acting in a representative capacity* in formal proceedings before the Commission shall conform to the standards of ethical conduct required of attorneys before the courts of this State. If any such individual does not conform to such standards, the Commission may decline to permit such individual to act *in a representative capacity* in any proceeding before the Commission.

This language unquestionably applies only to those attorneys or lay people who provide “representation” [per Commission Rule 103-804(S)(1)]—not those who act in a purely testimonial capacity [per Rule 103-804(R)]. Rule 103-867 does not require that every person acting in a representative capacity actually be a licensed attorney – but it does require that those

individuals meet the ethical standards required of attorneys. “Acting in a representative capacity” could not include those individuals who only appear as witnesses, otherwise Rule 103-867 would hold each of those witnesses (including, without limitation, BellSouth’s witnesses in this case) to the ethical standards required of attorneys. The only rational reading of this Rule, (and by extension Rule 1.7), is to conclude that an attorney must be “representing a client” in order to trigger its requirements.

The Commission has promulgated a separate rule addressing the conduct applicable to “witnesses,” further demonstrating the difference between those who provide “representation” and those who testify in Commission Proceedings. Rule 103-869, “Witnesses” addresses the examination of witnesses, how their testimony may be limited, and other aspects of how witness testimony and exhibits may be received by the Commission. The specific and separate rules for “witnesses” and “representatives” show that these functions are mutually exclusive unless a person undertakes to do both.

THE RULES OF PROFESSIONAL CONDUCT
DO NOT PROVIDE FOR THE RELIEF SOUGHT BY BELL SOUTH

As a threshold matter, the Rules of Professional Conduct do not contemplate the affirmative, extraordinary relief sought by BellSouth. In fact, it is not clear that the Hearing Officer (or the Commission, any Court, or even the Disciplinary Committee) would have the power to exclude testimony based upon the existence of such a conflict. BellSouth has not cited to any such authority for that proposition. Tribunals’ involvement with alleged violations of Rules 1.7 and 3.7 is at most to disqualify an attorney from representing or advocating on behalf of a client. *See* Rule 1.16, “Declining or Terminating Representation,” and the South Carolina Bar Ethics Advisory Opinions Cited Above. Application of the Rules is not designed to provide affirmative relief for the parties:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.* The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Rule 407, SCACR, “Scope.” (Emphasis added). The extraordinary relief sought by BellSouth is not only inappropriate, but inappropriately sought.

Rule 3.7 and its Comments further demonstrate that BellSouth would not be entitled to the remedy it seeks in this case even if Mr. Russell had sought to act as both an “advocate” and a witness in this case: exclusion of the testimony of Mr. Russell that became evidence without objection. In the event that Mr. Russell intended to testify in a case where he was actually “advocating for a client,” he would need (except under certain circumstances—which would allow him to do both) to disqualify himself as an attorney representative. *See Wilcox and Crystal, Annotated South Carolina Rules of Professional Conduct*, 2002 Edition at Page 183: (“unless one of three limited exceptions applies, a lawyer is disqualified from serving as an advocate at trial if the lawyer ‘is likely to be a necessary witness.’”) The Rule does not prevent the lawyer from testifying as a witness. Thus, even in the event that Mr. Russell was counsel of record in this case (which he is not), and he intended to advocate (or advocated) on behalf of NuVox and the Joint Petitioners in this case (neither of which he did), Rule 3.7 would mandate that he be disqualified from appearing *as counsel*, but would have no effect whatsoever on his status as a witness.

Because Mr. Russell was never anything but a witness in this case, and never “qualified” as counsel of record, there was no need for him to have been “disqualified.” Thus, not only does BellSouth have no cognizable claim that a conflict existed, but the relief BellSouth seeks (that it should be able to prevent Mr. Russell from testifying) is not contemplated by the Rules. The application of Rule 3.7, even if proper in this case, would have required Mr. Russell to avoid acting as an advocate on behalf of NuVox and the Joint Petitioners. Since he never so advocated (or represented), no action is warranted.

BellSouth cites to no authority for the proposition that a witness who happens to be an attorney is subject to the provisions of Rule 1.7. No case, no South Carolina Bar Advisory Opinion, nothing save the bare assertion in its Motion supports BellSouth’s position in this case. Because no conflict exists under Rule 1.7, and because the Rules of Professional Responsibility do not provide for witness testimony to be excluded in the event such a conflict is determined to exist, BellSouth’s Motion must be denied.

BELLSOUTH’S ALLEGATIONS DO NOT TOUCH ON ADMISSIBILITY

BellSouth has raised no issue involving the admissibility of Mr. Russell’s testimony, either at the hearing or with its Motion to Strike, that would provide a basis for the exclusion of that testimonial evidence. The alleged “conflict” has nothing to do with the evidence itself (Mr. Russell’s testimony). As described below, Rule 403 of the South Carolina Rules of Evidence allows the exclusion of evidence in certain circumstances based upon the prejudicial nature *of the evidence in question*. When the allegation of a conflict does not touch on the admissibility of evidence at all, the exclusion of evidence is not warranted.

Mr. Russell provided substantially the same testimony in every state in which he testified, including South Carolina. There is no allegation (or proof) that Mr. Russell’s association with

Nelson Mullins influenced his testimony in any way or changed even one word of that testimony. Nor was that fact material to his testimony. Nor did that fact make his testimony before the Commission untruthful. Mr. Russell has not represented BellSouth in any matter or been privy to any information whatsoever involving BellSouth by virtue of his association with Nelson Mullins. Nor has BellSouth alleged that Mr. Russell has gained any BellSouth information whatsoever as a result of his association with Nelson Mullins. An evidentiary matter, no such information found its way into Mr. Russell's testimony.

Mr. Russell's testimony was prefiled in accordance with Commission practice and procedure. Had any "conflict" (assuming one existed, which is untrue) influenced Mr. Russell's testimony in any way (e.g. contained any improper information that Mr. Russell learned about BellSouth in the course of working for Nelson Mullins) (none has been alleged, and none exists), that BellSouth would have known of that information well before the hearing in this matter. Thus, had there indeed been any change to Mr. Russell's testimony brought about by his association with Nelson Mullins (and there was no such change), BellSouth would have had notice of same, and an ample opportunity to seek to "keep out" any such improperly gained information (even though there was no such information). The fact that Mr. Russell's testimony contained no such information demonstrates conclusively that the testimony is admissible (as has already been established), and BellSouth was not and cannot be unfairly prejudiced by that testimony.

**BELLSOUTH HAS NEITHER ALLEGED NOR DEMONSTRATED THAT RULE 403
OF THE SOUTH CAROLINA RULES OF EVIDENCE WARRANTS EXCLUSION OF
MR. RUSSELL’S TESTIMONY**

BellSouth has not raised any question regarding the admissibility of the testimony itself, but rather the professional ethics of the witness providing the testimony. In other words, BellSouth is trying to shoot the messenger, rather than attacking the propriety of the message. All that BellSouth has done, at best, is to attempt to attack the professional reputation and credibility of Mr. Russell. And that has been done. BellSouth has now alleged (falsely) in a publicly available document, that Mr. Russell has violated the Rules of Professional Conduct.

BellSouth has not even cited or raised the proper basis upon which Mr. Russell’s testimony could be excluded, much less demonstrated that such exclusion is warranted. BellSouth’s omission of this basis is understandable, because it would ask the Hearing Officer to rule that a (nonexistent) *attorney representative* conflict under Rule 1.7 of the Rules of Professional Conduct (which even if demonstrated would result in the disqualification of an attorney representative/advocate rather than the disqualification of the attorney as witness) should be addressed by applying a wholly separate rule applicable to the exclusion of *witness testimony* under the South Carolina Rules of Evidence. Obviously, this is nonsensical.

Rule 402 of the South Carolina Rules of Evidence provides in part that “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina.” It has been conclusively established that Mr. Russell’s testimony is relevant to the issues in this Docket, because no party objected to his testimony on the basis of relevance, and the Commission accepted his entire testimony into the record.

Assuming *arguendo* that BellSouth's charges touched on the actual evidence in the record in this case (which they don't), BellSouth has not satisfied the very high standard for excluding Mr. Russell's relevant record evidence. Rule 403 of the South Carolina Rules of Evidence states in part "Although relevant, evidence may be excluded if its probative value is *substantially outweighed by the danger of unfair prejudice . . .*" (Emphasis added). As set forth above, the probative value of Mr. Russell's testimony has been established conclusively. This testimony was prefiled, summarized at the hearing, entered into the record, and subjected to cross-examination by the ORS, BellSouth, and the Commissioners themselves. Thus, the question becomes not merely whether the "danger of *unfair* prejudice" exists (not bare, undefined and unexplained "prejudice", as alleged by BellSouth), but also whether that "danger of unfair prejudice" is *substantially* greater than the probative value of the testimony.

There is no "unfair prejudice" in allowing Mr. Russell's testimony to stay in the record. "Unfair prejudice" which requires exclusion of evidence means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Saltz* (S.C. 2001) 346 S.C. 114, 551 S.E.2d 240. There is nothing improper about considering Mr. Russell's testimony in this case, as seven other Commissions are in the process of doing. The fact that Mr. Russell has gone to work for Nelson Mullins does not render his testimony "tainted." Nothing about Mr. Russell's current employment would make the Commission's consideration of his testimony improper. BellSouth has cited no authority for the proposition that witness testimony is properly excluded when an attorney conflict arises under the Rules of Professional Responsibility. On the contrary, the Rules of Professional Conduct make clear that Mr. Russell's status as a witness (and thus his testimony) would not be affected in any way had Mr. Russell been acting in a representative capacity or attempting to advocate in this Docket.

BellSouth has not even alleged that any aspect of Mr. Russell's presented testimony itself is "unfairly prejudicial" to BellSouth. Instead, it merely makes the unfounded and unsupported claim that BellSouth should have had the right to silence its presenter. A mere allegation of a violation of the ethical canons without a showing of actual prejudice cannot be a basis for disqualification of an attorney, *See State v. Chisolm*, 439 S.E.2d 850, (S.C. 1994); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), much less a basis for the exclusion of witness testimony. BellSouth cannot show unfair prejudice with regard to Mr. Russell's testimony when that testimony was unaffected by the "conflict" allegation, and has been prefiled well in advance of the hearing, submitted without objection at the hearing, made part of the record *without objection*, and been subject to cross-examination from BellSouth, the ORS, and the Commissioners. In other words, BellSouth is not unfairly prejudiced by not having the opportunity to 1) allege a conflict that does not exist, and 2) seek a remedy it is not entitled to. Accordingly, no "unfair prejudice" substantially outweighs the probative value of Mr. Russell's testimony.

**BELLSOUTH HAS NOT OTHERWISE DEMONSTRATED
IT IS ENTITLED TO THIS EXTRAORDINARY REMEDY**

Thus, even if everything BellSouth alleges is true (which it is not), that Mr. Russell has violated the South Carolina Rules of Professional Responsibility by having a conflict of interest (which he does not), not being candid to the Commission (which he was), and committing professional misconduct (which he did not), it is not entitled to have Mr. Russell's testimony excluded. As set forth above, in the event that a conflict arises under the Rules of Professional Conduct, the remedy involves an attorney disqualifying himself from further representation. BellSouth has not cited to authority of any kind that would entitle it to the extraordinary relief it seeks via the Motion to Strike. In addition, the Hearing Officer must keep in mind that there is

another party in this case – Xspedius – that would be equally affected and unfairly prejudiced should Mr. Russell’s testimony be excluded.

A WORD ON ONE OF BELL SOUTH’S “RED HERRINGS”

BellSouth asserts “under normal circumstances BellSouth would also request that the Commission summarily rule in its favor on each of the issues that Mr. Russell sponsored in this Docket on the grounds that no evidence in the record supports any ruling adverse to BellSouth.” First, Joint Petitioners point out that one member of the Bar accusing another of ethical violations is not a “normal circumstance”. Second, (as is characteristic of its entire pleading) BellSouth cites no authority for its assertion. Third, as BellSouth is well aware, the records of two state proceedings are part of the record in this case. These records include Mr. Russell’s testimony and positions, and were given long before this issue arose. In addition, Xspedius’ witness James C. Falvey also has provided testimony on each and every issue in this case that does indeed support a ruling on each and every issue adverse to BellSouth. Thus, the idea that BellSouth would be entitled to summary disposition on any of the issues discussed by Mr. Russell is false and misleading.

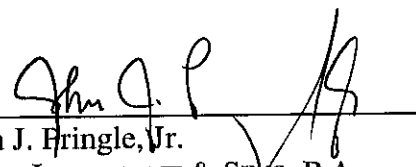
CONCLUSION

BellSouth has struck out at Mr. Russell – calling into question his ethics -- in a Motion that will cause substantial harm to NuVox and Xspedius if granted. While the issue of Mr. Russell’s testimony will be resolved, and this Docket continue, the issues raised by BellSouth regarding Mr. Russell’s fitness as an attorney will linger on the public record. After all, even if BellSouth’s Motion is denied, it is not at all clear that any ruling doing so will address head-on the fact that BellSouth has used the allegations of very serious ethical violations as a weapon to try to gain advantage in this proceeding—without citing any authority that would entitle

BellSouth to such "relief", and in fact ignoring established guidance indicating that no such "relief" is warranted. The Joint Petitioners therefore urge the Hearing Officer to consider BellSouth's Motion for what it is: an unsubstantiated broadside aimed squarely at the professional reputation of a BellSouth opponent, and rule accordingly.

WHEREFORE, the Joint Petitioners respectfully request that the Hearing Officer deny BellSouth's Motion to Strike, and grant such other relief as is just and proper.

Respectfully submitted,

By: 
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Attorneys for the Joint Petitioners

Columbia, South Carolina
June 24, 2005

EXHIBIT A



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Ethics Advisory Opinions

Ethics Advisory Opinion 99-03

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

Facts:

A lawyer in private practice is under contract to provide legal services to a county sheriff. The lawyer maintains a private office as well as an office within the sheriff's department. The sheriff has requested that the lawyer present evidence at preliminary hearings. The lawyer's duties at preliminary hearings will be to act solely as a witness testifying from the sheriff's files.

Question:

Is it permissible under the Rules of Professional Conduct for the lawyer to perform these duties?

Summary:

Under the facts presented, the lawyer is acting solely as a witness, which is not prohibited by the Rules of Professional Conduct. If the lawyer acts as both witness and sheriff's lawyer at a preliminary hearing, the conduct is prohibited by Rule 3.7 of the Rules of Professional Conduct, unless qualifying under one of the specific exceptions contained in this rule.

Opinion:

Under the facts of this inquiry, the attorney's duty at the preliminary hearing is limited to being a witness. The Rules of Professional Conduct do not prohibit an attorney from being a witness, provided that the attorney does not blend his role as attorney and witness.

Rule 3.7 of the Rules of Professional Conduct provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or
- (3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule

1.7 or Rule 1.9.

Although the lawyer's conduct does not violate Rule 3.7, it appears to the Committee that it would be prudent for a member of the sheriff's department other than the lawyer to testify at preliminary hearings to avoid confusion as to whether the lawyer is appearing as a witness, an advocate, or both.

South Carolina Bar

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EXHIBIT B



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Ethics Advisory Opinions

Ethics Advisory Opinion 90-05

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

An attorney must decline representation if he knows or it is obvious that he ought to be called as a witness. DR 5-101; 5-102. The roles of witness and advocate are inconsistent, since an attorney's representation makes him subject to impeachment as a witness, and places him in the unseemly position of arguing his own credibility. EC § 9. Where an attorney has not, in fact, testified or where the fact-finding portion of the suit has ended, however, the conflict between roles as a witness and advocate don't exist. Accordingly, the attorney may resume representation of the client upon appeal.

Question:

Where an attorney has declined representation of a client due to his potential status as a witness at trial, may that attorney thereafter represent the client upon appeal where he did not actually testify?

Opinion:

Assuming there exists no other basis for the attorney to decline representation, the representative of the client is not prohibited by the Code of Professional Responsibility, Rule 32, Supreme Court Rules.

The prohibition against serving as counsel and witness in the same case is set forth in DR 5-101(B) and DR 5-102. The reasoning behind this rule can be found in EC

5-9:

If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Where the credibility of a witness' testimony is not placed into issue, the prohibition against acting as both witness and advocate does not apply. *Coppock v. Helfer*, 515 P.2d 488 (Colo. Ct. App. 1973). Thus, where the testimony is related to uncontested matters or formalities, an attorney may ethically engage in both roles. DR 5-101(B)(1), -(2); EC 5-10. Where summary judgment is granted, the attorney has not testified in the lower court, and the credibility of his testimony is not an issue before the appellate tribunal, it is ethically permissible to represent the corporation upon appeal. *Marine Midland Bank v. Canisius College*, 127 A.D.2d 1000, 512 N.Y.S.2d 943 (App. Div. 1987).

This opinion is specifically limited to the issue of a conflict based solely upon the likelihood of the attorney testifying at trial. Should an appeal from summary judgment be successful and the case be remanded for trial, counsel must again consider whether he or she has a conflict based upon the need for his or her testimony.



EXHIBIT C



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Ethics Advisory Opinions

Ethics Advisory Opinion 05-06

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

RULES 1.7, 1.9 and 3.7

Date

March 18, 2005

Facts

Attorney represents a criminal Defendant concerning two separate incidents. Defendant has been charged with two counts of Kidnapping, two counts of Burglary in the First Degree, ABHAN, Misconduct in Office, and Pointing and Presenting a Firearm. Both alleged victims have made statements to Attorney that have made Attorney a necessary witness.

Attorney has advised Defendant, and Defendant is in the process of obtaining replacement counsel. However, because of the nature of Defendant's charges, obtaining replacement counsel will require approximately \$40,000 to \$50,000. Attorney was representing Defendant pro bono.

Questions

1. Must Attorney withdraw as counsel for Defendant?

2. If Attorney is required to withdraw, may Attorney remain involved in Defendant's case, assisting Defendant's replacement counsel, so long as Attorney does not speak in open court in front of the jury, other than as a witness (i.e., may Attorney argue motions, investigate, consult with replacement counsel at counsel's table during trial)?

3. If Attorney is required to withdraw, may Defendant's replacement counsel be another member of Attorney's firm?

Summary

1. Pursuant to Rule 3.7 of the South Carolina Rules of Professional Conduct, Attorney may be required to withdraw from representation.

2. Pursuant to Rule 3.7, except for participation in the trial of the case itself, Attorney may remain involved in the preparation of and pre-trial matters related to Defendant's case.

3. Subject to the prohibitions of Rules 1.7 and 1.9, Rule 3.7 permits replacement counsel to be another member of Attorney's firm.

Opinion

The factual scenario described by this inquiry is addressed squarely by Rule 3.7(a) of the South Carolina Rules of Professional Conduct, South Carolina Supreme Court precedent, and prior opinions of this Committee. *See, e.g., State v. Sanders*, 341 S.C. 386, 534 S.E.2d 969 (2000) (holding, interpreting Rule 3.7, a criminal defendant has a *qualified* constitutional right to select defense counsel); *S.C. Bar Ethics Adv. Op. # 04-08* (stating an attorney, who is likely to testify as a guardian *ad litem*, may not represent the ward during judicial proceedings); # 98-02 (same); # 90-27

(stating an attorney disqualified from handling the trial itself may continue to handle other pre-trial proceedings in which the attorney will not be a witness); # 90-05 (stating an attorney, who is not actually called as a trial witness, may subsequently handle the case on appeal).

In relevant part, Rule 3.7 provides: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; . . . or (3) disqualification of the lawyer would work substantial hardship on the client." ¹ Although Attorney's inquiry presents what appears, on its face, to be precisely the type of situation contemplated by Rule 3.7, before Attorney determines whether to voluntarily withdrawal from representing Defendant, we invite Attorney to review the Supreme Court's opinion in *Sanders*, specifically addressing withdrawal of criminal defense counsel. Once Attorney reviews *Sanders* and the other relevant legal and ethical authority, Attorney should be able to make an informed decision regarding whether to withdrawal voluntarily. Because of the fact-specific and individualized nature of a Rule 3.7 withdrawal, the Committee offers no opinion regarding whether Attorney must withdraw.

Assuming Attorney eventually withdraws (whether by voluntary or involuntary means), Attorney may continue to participate in the preparation of, and pre-trial matters related to, Defendant's case, as more fully outlined by this Committee's prior opinion (# 90-27) and the annotations to Rule 3.7 in Robert M. Wilcox and Nathan M. Crystal, *Annotated South Carolina Rules of Professional Conduct* (2002 ed.). Cf. Rule 3.7(a) (stating "[a] lawyer shall not act as an advocate *at a trial*" (emphasis added)).

Finally, subject to the prohibitions of Rules 1.7 and 1.9, Rule 3.7 permits Defendant's replacement counsel to be another member of Attorney's firm. The normal imputed disqualification of Rule 1.10 does not apply to the Rule 3.7 advocate-witness withdrawal. However, if replacement counsel is another member of Attorney's firm, we encourage replacement counsel to review thoroughly Rules 1.7 and 1.9 before undertaking Defendant's representation.

1 Based on the facts of this inquiry, subitem "(2)" of the subsection "(a)" (relating to an attorney's fees for services) clearly does not apply, and therefore, is not addressed in this opinion.

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